LIBRARY

Supreme Court, U.S.
FILED
OCT 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-523

FREDERIC C. WILHOIT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

STANLEY M. DIETZ
1029 Vermont Avenue, N.W.
Washington, D.C. 20005
Attorney for Petitioner

October 1971

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
HOW FEDERAL QUESTIONS ARE PRESENTED	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	11
APPENDIX	1a–34a

TABLE OF AUTHORITIES

Cases:

A Book Named "John Clelland's Memoirs of a Woman of Pleasure" v. Attorney General (The Fanny Hill Decision), 383 U.S. 413	8
Carlos v. New York, 396 U.S. 119	10
Central Magazine Sales v. U.S., 389 U.S. 50	9
Childs v. Oregon, 401 U.S. 1006	7, 11
4,400 Copies of Magazines v. U.S., 276 F. Supp. 902	11
Fred Bloss v. Steven Dykema, 398 U.S. 273	11
Ginzburg v. U.S., 383 U.S. 463	8, 10
Jacobellis v. Ohio, 378 U.S. 192	8, 9
Joseph Burstyn v. Wilson, 343 U.S. 495	9
Manual Enterprises v. Day, 370 U.S. 378	9
Memoirs v. Massachusetts, 383 U.S. 413	5, 7, 8, 10
Mishkin v. New York, 383 U.S. 502	8
Morris v. U.S., 259 A.2d 337	8
One, Inc. v. Oleson, 355 U.S. 371	9
Pennekamp v. Florida, 328 U.S. 331	9

Page

Potomac News v. U.S., 389 U.S. 47 9
Redrup v. New York, 386 U.S. 767 ..... 8, 10, 11
Roth v. U.S., 354 U.S. 476 ..... 7, 8, 10
Stanley v. Georgia, 394 U.S. 557 9
United States v. Klaw, 350 F.2d 155 8
Winters v. New York, 333 U.S. 507 9

Statutes and Rules:

District of Columbia Code, § 2001(a)(1)A, Title 22 ..... 1, 2
28 U.S.C.A. § 1257(3) 2
Rules of the Supreme Court Nos. 10, 11, 19(1)(A), and 22(1) 2

CONTENTS OF APPENDIX

District of Columbia Code, Title 22, § 22-2001 ..... 1a
U.S. Constitution, Amendments I and V 2a
District of Columbia Court of Appeals Opinion 3a
Information 9a
Excerpts of Proceedings 10a
Testimony of David A. Hall 10a

IN THE

Supreme Court of the United States

No.

FREDERIC C. WILHOIT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above entitled case on July 13, 1971.

OPINIONS BELOW

Petitioner was arrested and charged with violating Title 22, District of Columbia Code, § 2001(a)(1)A, in the City of Washington, District of Columbia, on January 4, 1971. The trial was held in the Superior Court of the District of Col-

umbia on March 2nd and 3rd, 1971. The Petitioner was convicted of violating Title 22, D.C. Code, §2001(a)(1)A, by selling a book entitled, "The Teeny Suckers", on December 17, 1970, to a Metropolitan Police plainclothes detective. Judge Charles Halleck of the Superior Court for the District of Columbia sentenced the Petitioner to serve one year imprisonment and to pay a fine of $3,000.00 The opinion of the Superior Court for the District of Columbia is unreported but appears in the record herein at Appendix Pages 29a thru 31a) The Petitioner's conviction was affirmed by the District of Columbia Court of Appeals on July 13, 1971, 279 A.2d 505, (Appendix Page 3a).

JURISDICTION

The judgment of the Superior Court of the District of Columbia was entered against the Petitioner on March 3, 1971. The judgment of the District of Columbia Court of Appeals was entered on July 13, 1971. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (3), and The Rules of the Supreme Court of the United States No. 10, 11, 19 (1) (A), and 22 (1).

QUESTIONS PRESENTED

1. May a 190 page publication containing seven chapters of text and 47 photographs be held obscene under the Doctrine of "Res Ipsa Loquitor" when the prosecution does not produce evidence that the book is proscribable and not presumptively protected First Amendment materials?

2. Is the book, "The Teeny Suckers", obscene in the constitutional sense when it was sold to an adult, without obtrusive advertising or pandering?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, and Fifth Amendments to the Constitution of the United States and the provisions of Title 22, District of Columbia Code, § 2001 (a) (1), are set forth in the Appendix hereto at Page 1a, 2a.

STATEMENT OF THE CASE

On December 17, 1970, the Petitioner was employed at the Village Bookstore at 1401 H Street, N.W., Washington, D.C. and sold to Detective David Hall, of the Metropolitan Police Morals Division, one copy of a book entitled, "The Teeny Suckers," (Appendix, Pages 10a-11a). The Village Bookstore sells, among other literary items, erotic books, to adults only, and there was no obtrusive advertising, Appendix Pages 12a-13a). The book was sold encased in a plastic wrapping and there was no pandering involved with the sale. The Detective obtained a warrant for the arrest of the Petitioner on January 4, 1971, for violating Title 22, D.C. Code, § 2001 (a) (1) A.

The Petitioner appeared before Judge Charles Halleck in the Superior Court of the District of Columbia for trial by the Court, without a jury, on March 2, 1971. In the Superior Court of the District of Columbia, the Government introduced the book, "The Teeny Suckers", in evidence and rested without offering any witnesses other than Detective Hall. Judge Halleck recessed the trial to be afforded the opportunity to read the book, (Appendix Pages 18a-19a), and on March 3, 1971, the Court reconvened and found the book, "The Teeny Suckers", to be hard-core pornography, Appendix Page 22a), and the Court relieved the Government of any duty to produce any further evidence relating to questioned redeeming social value or contemporary community standards of tolerance of comparable erotic literary material, Appendix Pages 23a-24a). The Petitioner moved for Judgment of Acquittal at the close

of the Government's case, which was denied, and the Petitioner rested, and renewed his Motion for Judgment of Acquittal which was again denied by the Court, Appendix Page 29a.

The Superior Court found the Petitioner guilty and imposed the maximum sentence of one year imprisonment and a $3,000.00 fine. On March 8, 1971, the Petitioner filed his Notice of Appeal to the District of Columbia Court of Appeals and on July 13, 1971, the Petitioner's conviction was affirmed, (Appendix Page 3a).

HOW FEDERAL QUESTIONS ARE PRESENTED

At the trial in the Superior Court of the District of Columbia, following the Government's case, the following affirmative points were raised upon a Motion for Judgment of Acquittal:

(A) Failure of the prosecution to affirmatively prove that the book appeals to a prurient interest in sex; (B) that the book exceeded the level of candor tolerated by the national community; (C) that the book was utterly without social value, literary merit; (D) that the book could not be held obscene when sold to an adult without obtrusive advertising and/or pandering; (E) that the book was protected by the First Amendment to the Constitution of the United States.

The Petitioner's Motion for Judgment of Acquittal was denied and the Petitioner was convicted.

The Petitioner filed a timely Appeal to the District of Columbia Court of Appeals, raising the following points:

(1) Is the book, "The Teeny Suckers", constitutionally protected without the Court finding it to be utterly without redeeming value or totally devoid of literary merit?

Petitioner argued that the Court must find the book utterly without redeeming value or totally devoid of literary merit before stripping it of constitutional protection

and the Superior Court erred in holding the book, "The Teeny Suckers", to be obscene applying local, not national, community standards. As stated alternatively, in an obscenity prosecution where the questioned obscene literary material is predominantly textual, is the prosecution bound to produce evidence of an utter lack of redeeming value or literary merit and evidence of the questioned material exceeding national contemporary community standards of tolerance of comparable erotic literature? Petitioner argued that the Government is required to produce such evidence and that the Superior Court erred in failing and/or refusing to require the Government to go forward with its proof upon these issues.

2. May a book be held obscene if it is sold to an adult, absent obtrusive advertising or pandering?

Petitioner argued that erotic literary materials are constitutionally protected if sold to adults, absent obtrusive advertising or pandering and the Superior Court erred in holding the book, "The Teeny Suckers", to be obscene without proof of sales to juveniles, obtrusive advertising or pandering.

The District of Columbia Court of Appeals on July 13, 1971, in a written opinion reported at 279 A.2d 505, (Appendix Page 3a), affirmed the Superior Court of the District of Columbia. This affirmation concluded that the Superior Court of the District of Columbia had found the book, "The Teeny Suckers", to be utterly without redeeming value despite the statement by the Judge in the Superior Court of the District of Columbia that the book does not appeal to prurient interest but "turns me off", and "it has quite the opposite effect", and three (3) other references by the Judge of the Superior Court that there were twelve (12) to fifteen (15) pages of meritorious materials but that he was finding the book obscene, "*Memoirs v. Massachusetts* to the contrary not withstanding". The District of Columbia Court of Appeals affirmed and also declared that upon a finding of hard core pornography by the Court below it

was not encumbent upon the prosecution to offer any other evidence relating to obscenity.

REASONS FOR GRANTING THE WRIT

1. The book, "The Teeny Suckers", is protected by the First Amendment to the Constitution of the United States of America and not obscene as a matter of law.

In an obscenity prosecution where the questioned obscene literary material is predominantly textual, (The book "The Teeny Suckers" is 190 pages, 47 pages of photographs), is the prosecution bound to produce evidence of an utter lack of redeeming value, or literary merit, and evidence of the questioned publication exceeding national contemporary community standards of tolerance in depicting sex in comparable erotic literature? Petitioner argues that the Government is required to produce such evidence and the Superior Court of the District of Columbia erred in failing and/or refusing to require the Government to go forward with its proof upon these issues and denied Petitioner his liberty without due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States of America. The Superior Court of the District of Columbia in announcing its decision, acknowledged that the book, "The Teeny Suckers", was not utterly without socially redeeming value or literary merit, (Appendix Page 21a), "Out of 190 pages of text in this book, as nearly as I can determine there aren't more than about fifteen pages that do not describe in a first person experience what has got to be some of the grossest material I think I have ever read, and, Mr. Dietz, I have read a lot." At Appendix Page 27a, ". . . I am looking at the entire work as a whole, and that entire work as a whole is hard-core outright pornography in which for the first ten or twelve pages somebody attempted to pay lip service to what they presumed to be a requirement of some law and tried to make some effort, clumsy and disgusting as it is, to try and discuss some sort of ten or twelve page little review of Havelock, Ellis, and the Kinsey report, and try to suggest that

certain things occurred, and then it suddenly breaks into a first person account of some of the most outrageous things that I have ever read. In that entire book, save a handful of pages, perhaps not more than fifteen in total, is devoted to what are, if you will, outright hard-core pornographic discussions purportedly in the first person of all of the different things that they have experienced or gone through, and all this sort of business that goes on and on."

The Superior Court of the District of Columbia held the book to be obscene since the majority of the text contained first person descriptions of sexual activities of all types, which is the same format employed by John Clelland in his "Autobiography of a Woman of Pleasure" which was reviewed and found to be constitutionally protected by the the Supreme Court of the United States in *Memoirs v. Massachusetts,* 383 U.S. 413.

The original modern day definition of obscenity in the constitutional sense is found in *Roth v. U.S.,* 354 U.S. 476. A majority of the Supreme Court, while saying that, "obscenity is not within the area of constitutionally protected speech or press", also said that, ". . . Sex and obscenity are not synonymous", Id at Page 487. The majority then defined as obscene that kind of material, the dominant theme of which, taken as a whole and applying contemporary community standards, appeals to the prurient interest of the average person. Id at Page 489. Judge Halleck, in the Superior Court of the District of Columbia, did not apply the proper test to determine a prurient appeal, *Childs v. Oregon,* 401 U.S. 1006, reversing 431 F.2d 272. He stated at (Appendix Page 46), ". . . At your request I read it from cover to cover. . . I very nearly threw up half way through it, it is that gross. As a matter of fact, from my own experience in looking at those pictures and in reading, it is so gross, and so terrible that it has the opposite effect on me. . . it turns me off. You know, those pictures look like open heart surgery on television. . . . I waded through all 190 pages of it. . . . Now, there is no question but what

it is designed to appeal to prurient interests. As for my part in it, Mr. Dietz, you know, it has quite the opposite effect as far as I am personally concerned. Now, undoubtedly that's not what is intended.". Under the *Roth* definition, reiterated in *Jacobellis v. Ohio*, 378 U.S. 192, elaborated in *Ginzburg v. U.S.*, 383 U.S. 463, adjusted in *Mishkin v. New York*, 383 U.S. 502, summarized in *A Book Named "John Clelland's Memoirs of a Woman of Pleasure" v. Attorney General (The Fanny Hill Decision)*, 383 U.S. 413, dichotomized in *Redrup v. New York*, 386 U.S. 767, three (3) elements must coalesce:

". . . It must be established that (A) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (B) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (C) The material is utterly without redeeming social value."

Judge Halleck in the Superior Court of the District of Columbia decided that, "The Teeny Suckers", was hard core pornography as defined in *Morris v. U.S.*, 259 A. 2d 337. He completely disregarded the teachings of *Memoirs v. Massachusetts*, 383 U.S. 413, when he stated, . . . (Appendix Pages 23a-24a) ". . . Government's Number 1, a 190-page book, replete with some forty or fifty pictures in living color and in black and white, nothing that could possibly suggest to me that that is other than hard-core pornography, and that is and must be logically and reasonably the ruling of this Court, *Fannie Hill* to the contrary notwithstanding." In coming to this determination, Judge Halleck applied his own conception of the contemporary community standards in the District of Columbia, (Appendix Pages 30a-31a). This was error, *U.S. v. Kuw*, 350 F.2d 155. The Superior Court of the District of Columbia applied a local, rather than a national, standard of tolerance of erotic literature. Local guidelines are not appropriate, however, for if each of the fifty states, the District of Columbia, Puerto Rico and the Virgin Islands, were free to apply their own contemporary community standards for what they might proscribe as

obscene, ". . . The constitutional limits of free expression in the nation would vary with state lines." *Pennekamp v. Florida,* 328 U.S. 331, at 335. It was to avoid that kind of unthinkable result that Justice Brennan, announcing the judgment of the Court in *Jacobellis v. Ohio, supra,* wrote, ". . . The constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national constitution we are expounding.". See also the concurring opinion of Justice Harlan, in *Manual Enterprises v. Day,* 370 U.S. 378, at 488.

The Constitution of the United States protects all literary materials that express ideas. This guarantee is not confined to the expression of ideas that are conventional or shared by the majority; see *One, Inc. v. Oleson,* 355 U.S. 371, reversing 241 F. 2d 772; and *Potomac News v. U.S.* 389 U.S. 47, reversing 373 F.2d 635, which affirmed 253 F. Supp. 498; including photographic expression, *Central Magazine Sales v. U.S.,* 389 U.S. 50, reversing 373 F. 2d 633. The constitutional guarantees in the realm of ideas protects expression which is eloquent no less than that which is unconvincing, *Joseph Burstyn v. Wilson,* 343 U.S. 495. "Nor is it relevant that obscenity, in general, for the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed, such a line can be drawn at all. See *Winters v. New York,* 333 U.S. 507, at 510.". *Stanley v. Georgia,* 394 U.S. 557.

Thereupon, Petitioner argues that the Superior Court of the District of Columbia erred in holding, "The Teeny Suckers", to be hard core pornography without the introduction of evidence relating to any of the elements of obscenity. The Superior Court of the District of Columbia applied a theory of "Res Ipsa Loquitor" requiring no evidence other than the book, "The Teeny Suckers", to establish an exception to the constitutional protection. Petitioner argues that this publication cannot be classified as obscene merely upon the presentation of the book alone,

because of the textual content which the Superior Court of the District of Columbia recognized was not utterly devoid of value, (although it contained photographs which standing alone would be obscene) (Appendix Page 32a).

2. May a 190 page book containing seven chapters of text and 47 photographs be held obscene if it sold to an adult, absent obtrusive advertising or pandering?

A text that is not utterly without redeeming social value or literary merit may not be held obscene if it is sold to an adult, absent obtrusive advertising or pandering. Petitioner argues that predominantly textual erotic literary materials are constitutionally protected if sold to adults, absent obtrusive advertising or pandering, and the District of Columbia Court of Appeals erred in affirming the Petitioner's conviction which held the book, "The Teeny Suckers", to be obscene, without proof of a sale to a juvenile, obtrusive advertising or pandering.

The Petitioner argues that the book, "The Teeny Suckers", is protected by the First Amendment to the Constitution of the United States of America. In the case of *Redrup v. New York*, 386 U.S. 767, the Supreme Court, per curiam, reaffirmed the initial definition of obscenity in *Roth v. U.S.*, 354 U.S. 476, as summarized in *Memoirs v. Massachusetts*, 383 U.S. 413, and subsequent decisions, but prior thereto, the Supreme Court stated at 386 U.S. 769, "In none of the cases was there a claim that the statute in question reflected a specific and a limited State concern for juveniles. . . In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure ot it. . . And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. U.S.*, 383 U.S. 463. . ."

A plethora of per curiam reversals based upon *Redrup* followed, all without opinion other than citing *Redrup*. Of significance is the decision in *Carlos v. New York*, 396 U.S. 119, reversing 24 NY 2d 865, wherein the New York Court of Appeals held the questioned material to be "hard core

pornography". To the same effect is *Fred Bloss v. Steven Dykema*, 398 U.S. 273, reversing 17 Mich. App. 318, and *Childs v. Oregon*, 401 U.S. 1006, reversing 431 F.2d 272.

The United States District Court for the District of Maryland, en banc, in *4,400 Copies of Magazines v. U.S.*, 276 F. Supp. 902, recognized that the *Redrup* decision applied constitutional protection to photographic literary materials even though their appeal was patently to the prurient interest, and even though the magazine exceeded the prevailing standards of candor and had no social value, holding their dissemination constitutionally protected unless there could be a showing of exposure to juveniles, offering for sale in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them or if they are offered for sale in a manner which amounts to pandering.

Thereupon, Petitioner argues that the Superior Court of the District of Columbia erred in denying to the book, "The Teeny Suckers", the protection of the First Amendment to the Constitution of the United States of America when the Government failed to attempt to prove that the questioned book was exhibited or sold to a juvenile, advertised obtrusively or pandered. The District of Columbia Court of Appeals thereupon, should have reversed the Petitioner's conviction and this Court should apply the protection of the First Amendment and issue a Writ of Certiorari to the District of Columbia Court of Appeals and reverse the Petitioner's conviction, with directions to the Courts below to enter a Judgment of Acquittal.

CONCLUSION

In summary, the book, "The Teeny Suckers", upon which the Petitioner stands convicted of a misdemeanor and sentenced to one year imprisonment and $3,000.00 fine, is no better than, nor no worse than, The Autobiography of a Woman of Pleasure, (Fannie Hill), and is entitled to the protection afforded by the First Amendment to the Con-

stitution of the United States of America. The inclusion of some forty-seven pages of photographs which, standing alone, would be considered hard core pornography, cannot strip the text of its social and literary value. There is no justification for proscription and penalizing the dissemination of such erotic textual materials. There has been no showing of an assault upon the privacy of individuals wishing to avoid confrontation with them. There has been no evidence of pandering. And there is no claim that the statute reflects a limited and specific concern for minors. The prosecution utterly failed to produce any affirmative evidence that the book was obscene other than the book itself and in First Amendment cases, "Res Ipsa Loquitor", does not apply.

Therefore, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

Stanley M. Dietz
Attorney for Petitioner
1029 Vermont Avenue, N.W.
Washington, D.C. 20005
202-347-6191

October 1971

APPENDIX

Title 22 – CRIMINAL OFFENSES

Chapter 20 – OBSCENITY

* * * * *

§ 22-2001. Certain obscene activities and conduct declared unlawful–Definitions–Penalties–Affirmative defenses–Exception.

(a) (1) It shall be unlawful in the District of Columbia for a person knowingly–

(A) to sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

* * * * *

(e) A person convicted of violating subsection (a) or (b) of this section shall for the first offense be fined not more than $3,000 or imprisoned not more than one year, or both.

* * * * *

CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

* * * * *

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

ATLANTIC REPORTER

Second Series

August 21, 1971 Edition

Frederick C. WILHOIT, Appellant,

v.

UNITED STATES, Appellee.

No. 5710.

District of Columbia Court of Appeals

Argued May 5, 1971.

Decided July 13, 1971.

The Superior Court, District of Columbia, Charles W. Halleck, J., found defendant guilty of selling obscene material and defendant appealed. The Court of Appeals, Pair, J., held that book containing 47 photographs, some in color, depicting male and female genitalia as they are involved in deviant sexual practices, and 7 chapters of text consisting of series of narratives of debauchery running perhaps entire gamut of perversion was pornographic without modicum of redeeming social value.

Affirmed.

* * * * *

PAIR, Associate Judge.

Appellant, then the proprietor of what has been described as the "World's Largest Adult Book Store," sold to an undercover officer of the Metropolitan Police Department a book entitled "The Teeny Suckers."[1] For this reason appellant

[1] Because the book is a part of the record and will be available in the event of further review, it would serve no useful purpose to sully the reports with a detailed commentary. We think it sufficient to say

was arrested and charged with a violation. D. C. Code 1967, § 22-2001 (Supp. III, 1970).[2] After trial without a jury, appellant was found guilty and sentenced to one year imprisonment and a fine of $3,000.

On this appeal the judgment of conviction is challenged on constitutional and other grounds but finding, after an examination of the record, no reversible error, we affirm.

Appellant conceded at oral arguments that the 47 photographs in the book, when considered out of context, are "hard-core pornography" within the purview of Morris v. United States, D. C. App., 259 A.2d 337, 341 (1969).[3] He

---

that the book, described by the trial judge as "outright pornographic filth," contains 47 photographs, some in color, depicting the male and female genitalia as they are involved in deviant sexual practices, and seven chapters of text consisting of a series of narratives of debauchery running perhaps the entire gamut of perversion.

[2](a)(1) It shall be unlawful in the District of Columbia for a person knowingly–

(A) to sell, deliver, distribute, or provide * * * any obscene, indecent, or filthy writing, picture * * * or other article. * * *

[3]In *Morris*, we quoted with approval from Donnenberg v. State, 1 Md. App. 591 at 600, 232 A.2d 264, at 269 (1967), where it was said:

> * * * [H]ard-core pornography or obscenity per se is obscenity which "focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose or justification." There is no desire to portray [it] in pseudo-scientific or "arty" terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose [is] to stimulate erotic response. * * * No proof, other than the viewing of it, is required to determine if it is, in fact, obscene.

urges, however, that the text of the book is of such intellectual content as to be constitutionally protected and that even the trial court acknowledged that the book was not utterly without socially redeeming value or literary merit.

The record, however, discloses no such acknowledgement. What appears is that the trial judge, after considering the book as a whole, characterized it as "utterly without any type of redeeming social virtue or value and is beyond peradventure hard-core pornography of the grossest kind," and that "[i]t is pornography—hard-core, outright pornographic filth." Referring to the text of the book, the trial judge said "t]he literary ability shown by the writer * * * is not even worthy of a fifth grader." At another point, the trial judge declared that "I searched in vain throughout all of the pages of that book, including the pictures, for anything that * * * could remotely * * * have any type of redeeming social value."

[1, 2] In obscenity cases involving, as they do, rights springing from the first amendment, a reviewing court is required to make an independent judgment as to whether the material brought into question is, as a matter of law, obscene (Jacobellis v. Ohio, 378 U.S. 184, 188-189, 84 S.Ct. 1676, 12 L.Ed.2d 793, (1964), and therefore beyond the perimeter of constitutional protection. Roth v. United States, 354 U. S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). To this end, we have made an appraisal of the book and experienced no difficulty whatsoever in concluding, as did the trial court, that the book is "pornographic filth of the grossest kind" without even a modicum of redeeming social value. See United States v. Reidel, 402 U. S.____, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971); United States v. Thirty-Seven (37) Photographs, 402 U. S. ___, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); Kaplan v. United States, D. C. App. 277 A.2d 477 (decided May 10, 1971); Morris v. United States, *supra*.

It is true, of course, that the trial court, in drawing its conclusions, considered the book as a whole, but that is the

very procedure mandated by *Roth*. There, the Supreme Court (354 U.S. at 490, 77 S.Ct. at 1312) approved instructions given to the jury to the effect that:

> The test in each case is the effect of the book, picture or publication considered as a whole. * * * The books [and] pictures * * * must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion. You judge the * * * pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

[3] Appellant contends, however, that the trial court, in concluding that "The Teeny Suckers" is hard-core pornography, applied local rather than, as required by Jacobellis v. Ohio, *supra*, national community standards. This contention is not supported by the record but assuming, *arguendo*, that the trial court applied the wrong standards, no more of a reply need be made to the argument than what we declared in Morris v. United States, *supra*, 259 A.2d at page 341:

> * * * [W]here obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, [Womack v. United States 111 U. S. App. D. C. 8, 294 F.2d 204] *supra;* Hudson, [Hudson v. United States, D. C. App., 234 A.2d 903] *supra*. In other words, if reasonable men could not differ and they could come to but one conclusion, *i.e.*, that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government in its case-in-chief need not offer any evidence of national community standards.

See also Kaplan v. United States, *supra*.[4] *Cf.* A Book, etc. v. Attorney General of Com. of Mass., 383 U. S. 413, 420, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), where notwithstanding the obscene character of the book, the trial judge determined that it possessed a "modicum of literary and historical value" and the Supreme Court refused to disturb such determination.

[4] Appellant contends finally that because, on the authority of Stanley v. Georgia, 394 U. S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), there is now a recognized right to possess obscene materials there is, of necessity, a correlative right to receive such materials. Based upon this reasoning, appellant would have us hold, without regard to Roth v. United States, *supra*, that he has a constitutionally protected right to market and sell to any adult, for enjoyment in the privacy of his home, obscene materials so long as there is no pandering or obtrusive advertising. We decline to do so because substantially the same argument was made to and rejected by the Supreme Court in United States v. Reidel, 402 U. S. ___, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), and United States v. Thirty-Seven (37) Photographs, 402 U. S. ___, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). Said the Supreme Court in the latter case at 1408:

> * * * Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in Reidel, does not extend to one who is seeking, as was Luros here to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution. As we held in Roth v. United States, 354 U. S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and reiterated today in *Reidel, ante*, obscenity is not within the scope of first amendment protection. * * *

---

[4] Where there is a ruling of obscenity per se, the defense is privileged to offer evidence of the national community standard to prove that the material is not obscene for purposes of Roth v. United States, *supra;* Kaplan v. United States, *supra;* Morris v. United States, *supra*.

We hold, therefore, that the appellant had no constitutionally protected right to engage in the business of marketing and selling any such book as "The Teeny Suckers."

Affirmed.

DISTRICT OF COLUMBIA
COURT OF GENERAL SESSIONS
CRIMINAL DIVISION

[Filed January 4, 1971]

THE UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA INFORMS THE COURT THAT WITHIN THE DISTRICT OF COLUMBIA:

Frederick Cecil Wilhoit
331 C St. S.E.

did on or about 12-17-70

Did unlawfully, knowingly sell, deliver, distribute or provide an obscene, indicent or filthy writing, picture, to wit: a book entitled "The Teeny Suckers" in violation of T. 22-200. (a) (1) (A),

District of Columbia Code.

UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA

By: /s/ W. R. King
Assistant United States Attorney for the District of Columbia

Date: January 4, 1971
Ofc. David A. Hall MD 1550

Washington, D.C.
Tuesday, March 2, 1971

[3] PROCEEDINGS

THE DEPUTY CLERK: United States versus Frederick C. Wilhoit.

THE COURT: Gentlemen, I see that there was an application in here to amend the information along with the Government's points and authorities in opposition to dismiss. Has that been ruled on?

MR. SEIDEL: I think it was granted. The Government has not received a copy of Judge McIntyre's–

THE COURT: He just simply said that the defendant's motion to dismiss is hereby denied, but he apparently didn't rule–do you have any objection?

MR. DIETZ: No objection to the Government's motion, Your Honor. I thought it had been granted.

THE COURT: Very well. Deliver, distribute and provide. So, it should read sell, deliver, and distribute and provide.

Shall I get a jury panel?

MR. DIETZ: No. We're going to waive a jury, Your Honor. I had informed your clerk we'll waive the jury.

THE COURT: Very well. Mr. Wilhoit, you understand you have a constitutional right to a jury trial?

MR. WILHOIT: Yes, sir.

* * * * *

[4] DAVID A. HALL,

having been called as a witness on behalf of the Government, and having been previously duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SEIDEL:

[5] Q. Officer, do you want to state your full name, rank, and duty assignment? A. David A. Hall. I am a plainclothes-

man assigned to the Morals Division of the Metropolitan Police Department.

Q. Officer, I would like to direct your attention to December 17th, 1970, and ask you if you were at 1401 H Street, Northwest? A. Yes, sir; I was.

Q. What were you doing there, and at what time? A. It was about 12:58 p.m. I went in the store and purchased a book from the defendant.

Q. Mr. Wilhoit? A. Yes, sir.

Q. Seated here? A. Yes.

Q. And what was the name of that book? A. The book was entitled "The Teenie Suckers."

MR. SEIDEL: Your Honor, may we have this marked as Government's Number 1 for identification?

THE COURT: Yes

(Item referred to marked as Government's Exhibit No. 1 for identification.)

BY MR. SEIDEL:

Q. Officer, I'm handing you Government's 1 for identification, and ask you if you can identify it?

[6] A. Yes, sir; I can.

Q. And where have you seen it before? A. This was the book that I purchased on December–

* * * * *

Q. Officer, you said that's the book you purchased from Mr. Wilhoit? A. Yes, sir. It's marked on the inside cover.

Q. How much did you pay for that book? A. I paid $7.79 from advanced Metropolitan Police Department funds.

Q. Did you give that money to Mr. Wilhoit? A. Yes, sir; I did.

Q. Have you seen Mr. Wilhoit in that establishment prior to that time? A. I believe I had seen him in there prior to that.

Q. And have you seen him in there subsequent to December 17th? A. Yes, sir; I have.

* * * * *

[7] BY MR. SEIDEL:

Q. What is the name of that establishment? A. The name of the establishment is "The Worlds Largest Adult Book Store."

Q. Would you please describe for the Court the character of the establishment? A. You mean the contents of the store?

Q. Yes. What is it? A. It's numerous magazines and books inside of the store.

Q. What type of magazines and books? A. There's all types. Mostly I would say the store contains books of a sexual nature; nudist magazines, paperbacks—adult paper back books, adult magazines, male magazines, and some newsweekly magazines, and so on.

MR. SEIDEL: I have no further questions.

THE COURT: Cross-examine.

CROSS-EXAMINATION

BY MR. DIETZ:

Q. Detective Hall, you say that this store contains newspapers? A. Yes, sir; it contains some newspapers.

Q. And it also contains nudist magazines?

[8] A. Yes. It contains those also.

Q. And does it contain magazines for sale such as "Playboy," "Esquire," "Newsweek?" A. "Playboy" I'm sure of. The other two I'm not sure of.

Q. Would you deny that it has "Newsweek" magazine offered for sale, and "Esquire" magazine offered for sale? A. Yes, sir; I would. I don't ever remember seeing those magazines there.

Q. Have you seen "Life" magazines offered for sale there? A. Not that I can remember.

Q. "Look" magazine? A. No.

Q. Well, what other magazines of national distribution? You said there were weekly magazines. A. "Playboy" is the only one I can think of offhand that I remember seeing. I dont't know—exactly know what type of magazine you're asking me to describe to you.

Q. Detective Hall, you testified a little bit earlier that there were weekly type of magazines. What kind of weekly magazines did you refer to? A. Well, I won't say a weekly, I'll say a monthly. "Playboy" is a monthly. I believe I've seen one or two gun magazines in there. And then there is–

Q. You mean sporting type magazines for sportsmen? A. Yes, I have seen one or two of those I can remember, [9] plus there is magazines that come out periodically that are adult type magazines.

Q. All right. Now, when you purchased this magazine–excuse me–this book, "The Tennie Suckers," which I believe is Exhibit 1, was it wrapped in cellophane? A. Yes, sir; it was.

Q. So that it was not open so that you could look at the photographs inside of the magazine; it was wrapped in cellophane inside of the newspaper–excuse me–book? A. It was wrapped in cellophane, yes.

THE COURT: The copy that you bought?

THE WITNESS: Yes, sir. The copy I bought was wrapped in cellophane.

THE COURT: Was there a copy on display?

THE WITNESS: Yes, sir.

THE COURT: Were there other books, pamphlets, or paper writings of any sort on display which depicted sexual activity of any sort?

THE WITNESS: Yes, sir.

THE COURT: Were there books or paper writings on display in that store which displayed the unclothed or bare genitals of men, or the genital or pubic areas of men or women?

THE WITNESS: Yes, sir.

THE COURT: Were there open and apparent in the [10] premises books, pictures,or other paper writings that displayed persons engaged in various acts of sexual conduct?

THE WITNESS: Yes, sir.

THE COURT: Many, or few?

THE WITNESS: A great majority of material in that store.

THE COURT: Were there any books, pamphlets, magazines, or other paper writings which were not wrapped in cellophane, which were available to be, if you will, thumbed through, or examined, or looked at by any prospective purchaser?

THE WITNESS: Yes, sir.

THE COURT: Did any of them display acts of sexual conduct, including any acts of sodomy, or homosexual activities, or sexual intercourse?

THE WITNESS: Yes, sir.

THE COURT: Or unclothed genitals, pubic areas, or the buttocks, or the breasts of persons?

THE WITNESS: Yes, sir.

THE COURT: Were those generally displayed throughout the store, or only in certain areas?

THE WITNESS: In the great majority of the area throughout the store those were displayed.

THE COURT: Did you have an opportunity at that time to examine the general display of merchandise throughout the store at the time you purchased this book, Government's [12] Exhibit 1 for identification?

THE WITNESS: Yes, sir.

THE COURT: Are you able to state in your estimation what percentage of the material which you observed fell in the categories about which I've just asked you?

THE WITNESS: Yes, sir.

THE COURT: Approximately what percentage of it displayed sexual activities or the bare and exposed breasts. or buttocks, or genital areas of men or women?

THE WITNESS: Ninety-five percent.

THE COURT: You may proceed.

BY MR. DIETZ:

Q. Detective Hall, these magazines that displayed the genital areas in photographs, were they nudist magazines? A. Some of them; yes, sir.

THE COURT: The regular type of magazine that people ordinarily subscribe to in the nature of "Look," "Life," "Sports Illustrated," "Time," "Newsweek," "McCalls," "Ladies Home Journal," that type of thing?

MR. DIETZ: Your Honor, may I object.

THE COURT: Is that the type of newsweek or weekly publication you had in mind?

MR. DIETZ: Yes, but when Your Honor limits it to subscribe to, this store does not do mail order business. I would not object if Your Honor limited it to magazines that [12] are sold generally to the general public.

THE COURT: You know if I could get some idea of the nature of the types of the news magazines you're referring to. There are all types of, if you will, news magazines and weekly newspapers.

MR. DIETZ: Yes, sir.

THE COURT: Ranging from, I think, is it the "Keyhole?" Is that still published? All the way to the "New York Times."

Perhaps if we could develop for the record exactly what it is you had in mind.

MR. DIETZ: Fine.

BY MR. DIETZ:

Q. Would you tell the Court? A. Do you want me—to ask me that again? I've forgotten itl

Q. Try to go into detail as to the type of newspapers that you see or saw in December of—December 17th of 1970 at the Worlds Book Store?

THE COURT: Worlds Largest Adult Book Store.

BY MR. DIETZ:

Q. Adult Book Store.

Thank you for the qualification. That's very important. A. Do you want me to go into detail about the material that's on display in the store?

[13] Q. Yes. Well, you said there were newspapers there. Tell the Court what kind of newspapers. Was it the "Washington Post?" Was it the "Screw" newspaper? The "Quicksilver Times?" A. They have for sale there, I believe the "Washington Post," and the "Evening Star,"and "Screw" newspaper, and "Gay" newspaper, and "Pleasure" newspaper and numerous other newspapers.

Q. Numerous other newspapers. All right. Now, as to the magazines, you said there were nudist magazines, and "Playboy" magazine, and there were magazines that were, you said, gun magazines–I call those men sporting magazines–can you remember any titles?

THE COURT: Sporting is a term of art generally recognized, when used here in the Court, in a different context. I trust you didn't mean sporting magazines.

MR. DIETZ: I meant hunting with a gun.

THE COURT: You mean like "Sports Afield," and "Field and Stream," and things of that sort?

MR. DIETZ: Magazines of that nature.

THE COURT: American Rifle Association's annual publication, if they put one out?

MR. DIETZ: I don't know that there is such a publication.

BY MR. DIETZ:

Q. I think you saw, did you not, magazines like "Sports [14] Afield," hunting magazines, gun magazines? A. I saw a couple of those in the store; yes.

Q. All right. And you also saw "Playboy". Did you see any magazines like "Gent," and "Dude," and "Swank"? A. Not that I recall.

Q. And you were over twenty-one years of age, are you not, sir? A. Yes, sir; I certainly am.

MR. DIETZ: I believe that's all that I'll ask him, since Your Honor was so helpful asking all those questions for me.

THE COURT: I thought perhaps you would appreciate that.

MR. DIETZ: I did, tremendously.

THE COURT: It seemed well to have the record be abundantly clear.

MR. DIETZ: It is.

MR. SEIDEL: No further questions, Your Honor.

Your Honor, at this time I move Government's Number 1 for identification into evidence.

* * * *

[17] THE COURT: Now, it's conceded that the officer went in–

MR. DIETZ: And purchased–

THE COURT: –and purchased the book. It's been sold?

MR. DIETZ: Yes, sir.

THE COURT: Apparently to anyone who has $7.79.

MR. DIETZ: To anyone who is an adult.

[18] THE COURT: An adult. Very well.

MR. SEIDEL: Your Honor, in response–

THE COURT: Or at least the officer is an adult, and he went in and bought it by the payment of $7.79.

MR. DIETZ: Well, I think the testimony has been that this is the Worlds Largest Adult Book Store.

THE COURT: Apparently that's what it says out front.

MR. DIETZ: And the officer didn't testify there was anyone in there or he had ever seen anyone in there less than 21 years of age.

THE COURT: All right.

* * * * *

[23] THE COURT: What is the defendant's connection with Village Books, Incorporated?

MR. DIETZ: He's just an employee now. At one time he was president, but now he's just an employee.

THE COURT: On December 17th, 1970?

MR. DIETZ: Actually December 17th he was not president, but I don't have any way of proving at the present time that he was not president.

THE COURT: Very well.

MR. DIETZ: Other than my statement to the Court that he was not then president.

* * * * *

[31] THE COURT: Well, your objection is overruled, and [32] the exhibit will be admitted into evidence.

MR. SEIDEL: Your Honor.

THE COURT: Yes, Sir.

MR. SEIDEL: At this time the Government will ask the Court to determine as a matter of law that the book is hard-core pornography; is obscene per se under the definition and the standards in the–

THE COURT: I see it has 190 pages. Do you want me to do that right now, or shall we–

MR. DIETZ: We had just discussed the possibility of Your Honor taking a recess and giving the Court an opportunity to read the text or material contained in that book.

THE COURT: Well, I see on the back cover of it, which I assume would have been readily seen through even cellophane, that it contains a notice that the book is for adults only, and is a frank discussion and review about sex, and suggests that the photos are posed by professional models in Europe. Cases in this firey study include: "The Fellatio Addict," "The Sucking Fetishes," "The Mother Sucker," and "The Cunning Linguist," and many many more.

I suppose quite frankly that at this juncture the first thing that I've got to determine before we go much further

is whether or not it's indeed hard-core pornography. If the Court makes a determination that it is, then I would [33] assume that the Government is relieved of the obligation of proving whether it violates contemporary community standards, and what those community standards are, both locally and nationwide.

Is that the purpose of your request, gentlemen?

MR. SEIDEL: Yes, Your Honor. We're proceeding under the procedure suggested in the *Morris* case, which is in 259 A.2d at around Page 337, I believe, Your Honor. Does Your Honor want that cite definitely? I think I can give you—

[34] THE COURT: Tomorrow afternoon at 2:00 o'clock. This matter is recessed then until tomorrow afternoon at 2:00 o'clock, and the Court will examine this Government's Number 1 in evidence and make a determination whether or not it's in the view of the Court hard-core pornography. I assume that that's something that I must determine initially.

[35] MR. DIETZ: Yes, sir.

THE COURT: If I conclude that it is, then, of course, that puts the Government in a position what, of resting its case?

MR. SEIDEL: Yes, Your Honor. We believe that we have proved scienter also in this case.

THE COURT: All right.

Now, is there anything that you want me to read in connection with what determines what is hard-core pornography?

MR. DIETZ: *Memoirs v. Massachusetts.*

MR. SEIDEL: The *Morris* case, Your Honor, and the cases from the—from Maryland cited in *Morris, Donenburg,* and that we believe clarifies the *Memoirs* test. *U.S. v. Wild,* Your Honor, the Government would suggest that you read.

* * * * *

[36] MR. DIETZ: *Memoirs* is 383 U.S., 413. And I would like the Court as well to read *Redrup v. New York*, which is 386–

THE COURT: I have that citation in your pleadings, I believe.

* * * * *

[37] Washington, D.C.
Wednesday, March 3, 1971

* * * * *

[38] PROCEEDINGS

THE DEPUTY CLERK: United States versus Frederick C. Wilhoit. Frederick C. Wilhoit. Continuation of the case from yesterday.

THE COURT: All right, gentlemen, at the time we recessed yesterday it was at the request of both parties in order that the Court could carefully review and study Government's Exhibit Number 1, being a volume entitled "The Tennie Suckers," with a notation on the front that it has thirty-two color plates. During the interim, and including last night and this morning, the Court has carefully examined the material, has looked at all the pictures, and has read the text of the book in question, and at this time I am prepared to rule on the question of whether or not it is hard-core pornography.

If there is anything either one of you wish to say in regard to that question, I will be glad to hear you. Anything you want to say, Mr. Prosecutor?

MR. SEIDEL: Your Honor, we think the book speaks for itself under the *Morris* decision. It screams out for the Court and the world to hear that it is obscene per se. That is all we have to say.

THE COURT: Mr. Dietz?

MR. DIETZ: Well, Your Honor–

THE COURT: Can you honestly contend in good conscience [39] to this Court that that book is not hard-core pornography?

MR. DIETZ: I can honestly contend in good conscience to this Court that that book is not hard-core pornography. I don't contend that the photographs that are contained in it, if they were by themselves, would not be considered hard-core, but the teaching of *Roth v. U.S.* is that you must consider the book as a whole.

THE COURT: I did.

MR. DIETZ: I understood from what Your Honor said–

THE COURT: And you read it?

MR. DIETZ; Yes, sir. And following the *Roth* decision and the majority opinion written by Justice Brennan wherein he stated that any piece of literature that disseminates any idea, any thought, is constitutionally protected. After the *Roth* case you have the decision of the Supreme Court of the United States in *Memoirs v. Massachusetts,* which I cited to Your Honor yesterday because it stands for the principle, and we must take into consideration that the book there involved was John Clellens autobiography of a woman of pleasure, commonly referred to as "The Life and Loves of Fannie Hill", a book that was written for pornography, no other purpose, but through the passage of time it has become recognized as a–

THE COURT: Are you suggesting to me–

MR. DIETZ: –as a classic.

[40] THE COURT: Are you suggesting to me that the contents of this book somehow or another approach in some fashion the so-called classic of "Fannie Hill"?

MR. DIETZ; Your Honor, I don't contend that this book is a classic, because first of all I'm not qualified to voice that opinion, but I do contend that this book has textual material that is of a socially redeeming value.

THE COURT: How?

Out of 190 pages of text in this book, as nearly as I can determine there aren't more than about 15 pages that do not describe in a first person experience what has got to be

some of the grossest material I think I have ever read, and Mr. Dietz, I have read a lot.

MR. DIETZ: Has Your Honor had the pleasure of reading the autobiography of a woman of pleasure, because in that book, which is all in the first person, and is over 350 pages, there is not one page, not one page, that does not describe in great detail the illicit love affairs that this lady enjoyed, including every conceivable sexual act; fellatio, cunnilingus, something referred to as beastiality, every conceivable normal or abnormal sexual activity is described in great minute detail, and the Supreme Court of the United States specifically held that book to be not obscene, to be constitutionally protected because it was not, quote, utterly–utterly–that's the trick word–utterly without value.

[41] Now, Your Honor has said the fifteen pages–

THE COURT: I am satisfied that this document considered as a whole, the book including the text and the pictures, taken as a whole, is utterly without any type of redeeming social virtue or value and is beyond peradventure hard-core pornography of the grossest kind.

I am frank to say to you that I think that this book transcends even anything Judge Prettyman might have considered possible when he wrote *Womack* versus the *United States*. That appears at 111 U.S. Appeals, D.C., at Page 8. And–

MR. DIETZ: Your Honor, may I make a comment?

THE COURT: And Chief Judge Lumbard, in my view had no idea when he wrote *United States* versus *Wiley* for the Second Circuit in 1969, and the memorandum on the rehearing in 1970, I don't believe he had any idea in looking at those films, and slides, and advertising brochures; that anybody in any way could consider that material of the nature of Government's Exhibit Number 1 could be anything other than hard-core pornography.

Of course, the Court has not solicited Mr. Justice Stewart's advice in the matter, although I suppose it would have been an easy thing to do, and I have no doubt that when Mr. Justice

Stewart remarked in *Jacobellis v. Ohio,* which is reported at 378 U.S., Page 184, I have no doubt when he suggested in regard to pornography "I know it when I see it,"[42] I have no doubt that if he saw this he'd know it.

This book in its totality is patently obscene, is patently hard-core pornography, whether you look at the pictures, whether you look at the text, or whether you look at it altogether. There cannot be any other conclusion, Mr. Dietz.

I am reminded of a debate or a lecture series which occurred not long ago between Senator Ervin and Ramsey Clark relating to the Supreme Court's function, and whether or not it rewrote the Constitution or simply interpreted it, and I am reminded of the suggestions that cropped up in the course of those debates that the Court, based upon its makeup at the time, may indeed determine that the constitution means something slightly different today than an earlier Court made up of judges thought that it might have meant at an earlier time. To cite but one example, the Court said, in *Brown v. Board of Education,* that what an earlier Court had said in *Pleazy v. Ferguson* was constitutional, was indeed no longer what the Constitution meant. I would suggest to you, Mr. Dietz, that what one Court may have suggested based upon its makeup as to what was constitutionally permissible in the field of obscenity as it related to First Amendment rights, may indeed, in the light of contemporary problems, and the difficulties faced in the nation today, no longer be what a new Supreme Court with new faces is willing to say in regard [43] to how far the nation is willing to go in the dissemination of obscenity.

I have not had brought to my attention, nor am I able to find any decision or any rationale which could possibly convince me that this particular book, Government's Number 1, a 190-page book, replete with some forty or fifty pictures in living color and in black and white, nothing that could possibly suggest to me that that is other than hard-core pornography, and that is and must be logically

and reasonably the ruling of this Court, *Fannie Hill* to the contrary notwithstanding. That being so, then, of course, it no longer is the responsibility of the Government in this proceeding to show what the contemporary standards are and to put on proof of what the national norm is as a proof of what contemporary community standards are. In this case the thing speaks for itself. It is pornography—hard-core, outright pornographic filth.

MR. DIETZ: May I respectfully object to Your Honor's ruling?

THE COURT: Of course. That's perfectly appropriate. I recognize that you are not satisfied with that ruling. That's the nature of the adversary proceeding, and your objection is noted and preserved for the record.

MR. DIETZ: I might state in passing, Your Honor—I am not trying to argue it, because you have ruled—

THE COURT: I want you to be able to make a full [44] record, Mr. Dietz.

MR. DIETZ: Well, I would note that this counsel was trial and appellate counsel in *Womack v. U.S.*, the case that Your Honor cited, a case that involved photographs of front views.

THE COURT: Slides. Colored slides, weren't they?

MR. DIETZ: No. They were photographs. Slides were evidence that we tried to get in as to the contemporary community standard. But they were photographs of front view nude males, and no text at all involved, just plain photographs. I might state to Your Honor that the standard has so changed in the twelve years or thirteen years since the *Womack* case originated that this same type of photograph in no way even challenged, considered to be obscene.

Now, Your Honor cited Justice Stewart in his concurring opinion in *Jacobellis v. Ohio*. Justice Stewart went a step further the next opportunity he had regarding hard-core pornography and the definition thereof in *Ginzburg v.*

U.S., when Justice Stewart adopted the definition of hard-core pornography advanced by the Solicitor General in his brief in the *Ginzburg* case, and I am frank to admit that the photographs contained in this book would come within Justice Stewart's definition of hard-core pornography, but I say that this book, because of not just the text, but the quality of the text, and Your Honor has indicated that it–

[45] THE COURT: The quality of the text. If you want to get into evaluating literary merit, as I understand the general basis of the authorship of a book called "Naked Came the Stranger," it was written, if you will, as a put on. It was written by a number of people who submitted chapters, and the idea was to see how badly it could be written and still sell, and in several instances it was reported that several chapters were returned to the writers because they were too well written. They had to be slopped up a little, if you will. The literary ability shown by the writer of this book in my view, Mr. Dietz, is not even worthy of a fifth grader. My guess is that junior high school students, given the assignment to write down what to them was the filthiest sort of a thing, with as much detail, with as much filth over and over again as frequently as possible, could do a better job of writing from a literary point of view than was in here.

Now, if it's necessary, and I don't think it is, but I could read into the record several sample passages out of that, Mr. Dietz, and you couldn't stand there and hold your head up.

If you want to examine it from a literary point of view, and I have a certain experience in reading, it's got to be some of the worst literary talent that ever came down the pike. If you want to look to it for something, some value in teaching, it has none. The text and the pictures simply [46] don't relate, except just once in a great while to pay a little service to the idea. There isn't an example of what one might consider to be the normal type of sexual intercourse in which male and female genitals are placed together in the text of that book. The pictures show that, and yet the text deals with oral sodomy.

Now, the pictures simply don't portray what the text is discussing. The pictures seem to be simply out and out plain hard-core pornography interspersed into pages in the book to add a visual stimulus to the intended stimulus to the prurient interest which is contained in the text.

I can't imageine how, either before me, or before the District of Columbia Court of Appeals, or before the United States Supreme Court for that matter, you or any other lawyer, A.C.L.U., or the finest group of lawyers that money could buy put together, could possibly convince anybody that this is other than hard-core pornography. As far as I am concerned you are perfectly willing to go ahead and try, but for my part, looking at it as realistically as it is possible to look at it, without introducing any personal bias or any personal considerations, but simply from a point of view of looking at it and reading it—at your request I read it from cover to cover—I very nearly threw up half way through it, it is that gross. As a matter of fact, from my own experience in looking at those pictures and in reading, it is so gross, and so terrible that [47] it has the opposite effect on me—it turns me off. You know, those pictures look like open heart surgery on television. They don't even purport to have any artistic value or in any way have any apparent purpose in mind of portraying the human body in any form that might be characterized as artistic. It's more like they were taken with a zoom lens literally in the course of open heart surgery on an operating table, and in many instances, in order to ascertain exactly what is going on, it is necessary to take the page and turn it first this way and then that. It appears as if in some instances the pictures may be inadvertently printed upside down, they are that close up and that bad, as you readily can see. As far as the text goes, I must say that, you know, having been required in my view as my function sitting as the trier of fact on this issue, or at least to the extent I have to determine if it's hard-

core pornography, I waded through all 190 pages of it—now, there is no question but what it is designed to appeal to prurient interests. As for my part in it, Mr. Dietz, you know, it has quite the opposite effect as far as I am personally concerned. Now, undoubtedly that's not what is intended.

I am also struck by the fact, when I looked at it, that apparently your client operates or is involved in the largest adult discount book store, because in the back it indicates that those volumes are supposed to sell for $9.95, [48] but the testimony indicated that the officer bought it for what, $7.79.

MR. DIETZ: I believe on the front cover it has $7.50. I don't know what the tax is.

THE COURT: If you look in the back—

MR. DIETZ: I know.

THE COURT: —it says, "If you like this one, you can get some more of them from Atlanta, Georgia, isn't it?

MR. DIETZ: That's the mail order price from the book people.

THE COURT: Well, I am afraid I searched in vain throughout all of the pages in that book, including the pictures, for anything that I could even remotely suggest might have any type of redeeming social value, and I am not taking just a picture, or just a particular paragraph, or just a particular section, I am looking at the entire work as a whole, and that entire work as a whole is hard-core outright pornography in which for the first ten or twelve pages somebody attempted to pay lip service to what they presumed to be a requirement of some law and tried to make some effort, clumsy and disgusting as it is, to try and discuss some sort of ten or twelve page little review of Havelock, Ellis, and the Kinsey report, and try to suggest that certain things occurred, and then it suddenly breaks into a first person

account of some of the most outrageous things that I have ever read. In that [49] entire book, save a handfull of pages, perhaps not more than fifteen in total, is devoted to what are, if you will, outright hard-core pornographic discussions purportedly in the first person of all of the different things that they have experienced or gone through, and all this sort of business that goes on and on. It's in the record. It's there. Any judge besides myself that's concerned about it has only to read it from front to back. If you can convince some other judge that sits in a higher position than mine that that is not hard-core pornography, you are welcome to try.

MR. DIETZ: Well, in light of Your Honor's ruling–

THE COURT: Are you satisfied now that in light of that ruling the Government need not go forward to produce evidence of what contemporary community standards may be?

MR. DIETZ: Your Honor asked me if I am satisfied. I have just objected to Your Honor's ruling.

THE COURT: You object to my ruling, but assuming the ruling is correct for the sake of argument.

MR. DIETZ: Then under the *Hudson* case the Government has rested, and the next step is mine, and my next step is to move the Court to enter a judgment of acquittal. My grounds, first of all, is that this book "Tennie Suckers" is constitutionally protected because it is not utterly without redeeming social value. That is the first ground.

The second ground under–that was under *Memoirs v.* [50] *Massachusetts*. Under *Redrup v. New York*, and under *Stanley v. Georgia* that I would argue to the Court that even if you consider this material to be hard-core pornography, then as long as there is no showing to the Court that it was pandered, advertised obtrusively, or exposed or dealt to a juvenile, then you still afford the protection of the First Amendment to this book and acquit the defendant.

* * * * *

[64] I don't think I assume too much when I assume that Your Honor intends to deny that motion. As soon as Your Honor does that, I intend to rest and to renew the motion at the close of all the evidence, and then we can proceed accordingly.

THE COURT: Your crystal ball is still as good as [65] it always was, Mr. Dietz.

MR. DIETZ: At least I'm accurate as to that.

THE COURT: Your motion is denied.

MR. DIETZ: I will now rest on behalf of the defendant and again move the Court for a judgment of acquittal at the close of all the evidence.

THE COURT: I don't really think that you have to do that when there is no jury.

MR. DIETZ: Probably so, Your Honor, but I like to touch all the bases.

THE COURT: All right, you touch the bases. If you are renewing the motion, the motion is denied. There is nothing presented in the interim, between your making the motion at the close of the Government's case, and at the close of all the evidence to justify my ruling any other way.

I would ask the defendant to rise.

I find the defendant guilty.

Is there anything you want to say on his behalf before I impose sentence?

MR. DIETZ: Well, several things.

THE COURT: Let me just, before we get started, in connection with my finding of guilty, let met just tell you something, Mr. Dietz. When it comes down to a question of sentence, when it comes down to a question of what the law is, there is in the District of Columbia, as you, and I, and as [66] your client knows, a statute which makes it unlaw-

ful for a person knowingly to sell, deliver, distribute, or provide, or offer, or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, pictures, sound recording, or other article or representation. It is against the law to sell obscenity in the District of Columbia.

Now, I have ruled that this book is hard-core pornography. Now, what do we have here? We have a statute which apparently finds favor among the vast majority of the citizens of this community, because there has been no hue and cry to have it repealed, altered, or amended.

The Court is faced with this problem, Mr. Dietz. It has before it a defendant who apparently makes his living dealing in pornography or close to pornography, and he is obviously doing so with full knowledge that he is skirting on the very edges of the law, and he is doing so undoubtedly in large measure in the hope that some appellate tribunal will declare the present statute unconstitutional.

I would hope that your client has as much singularity of purpose, personal fortitude, and a willingness to put himself in jeopardy for his principles as David Harris did. David Harris similarly elected to violate what was a recognized law of the land. He did it with full knowledge of the violation and deliberately, and then he went to jail for it deliberately and willingly, and took his chances with the [67] courts.

A trial judge, Mr. Dietz, to a certain extent is a servant of all of the people of the community, as well as a keeper of the law, and a protector of individual rights. A trial court has a multiplicity of responsibilities.

What it really comes down to is a determination by the legislature charged with making statutes, speaking as a voice of the people, passing a law that says it is a crime to sell, deliver, or distribute pornography, obscene, indecent, or filthy writings and pictures.

In my view the only way that you could possibly justify the sale of a book like that would be if this jurisdiction

adopted the same law as exists in Denmark; that is a no holds barred pornography across the board, and that really is the basic choice that the legislature has to make, and that choice has to be measured by the desires, and the demands, and the wants of the majority of the people to whom it is responsible. The fact that this statute is on the books, and the fact that the legislature has not seen fit to remove all limitations on the sale of pornography must, of course, be an indication to a trial court that the vast majority of the members of the community support this law.

In my view your client stands in deliberate and daring violation of that law. He stands in that deliberate and daring violation with what in this Court's view is a vain [68] and unfounded hope that some appellate court, clear to the United States Supreme Court, will see fit to assume the power of legislation under the guise of declaring that the First Amendment protects the dissemination of the type of filth that is embodied in that book.

I can really have very little sympathy with your client's position under the circumstances because obviously he is in it for profit, and again I repeat that inasmuch as your client, for a profit motive, stands in deliberate and daring defiance of a statute in full force and effect in the District of Columbia in what I predict is the vain hope that some court will somehow enlarge First Amendment rights to include his right to sell this sort of filth in the District of Columbia. As long as he stands in that position, I would hope that he has the courage of his convictions and the fortitude people like David Harris showed, and people like Martin Luther King showed when they stood in defiance of laws for a much nobler purpose than a profit motive. If people like that can take their chances, and take what the court has to deal out to them, then I hope that your client is able to do likewise.

I will hear you on his behalf before I impose sentence.

* * * * *

[70] * * * I ask Your Honor to extend to him one chance, an opportunity, and as I said, I'm quite sure that he will not be an employee of Village Book Store tomorrow or tonight, if you see fit to do that, taking into consideration, as I said earlier, his prior good record, and also keeping in mind that fellows like Wilhoit really don't consider themselves qualified to judge on the obscene nature of these books, because he can look at photographs, as you and I, and as Justice Stewart, and figure that they are obscene, but when he sees such a photograph, or thirty-two photographs included in a book of 200 or so pages, very candidly he wouldn't have the opportunity to sit there and read it through from cover to cover to evaluate it as far as redeeming value, and as Your Honor has acknowledged, there is a semblance—I think Your Honor said twelve or fifteen pages—

THE COURT: Out of 190.

MR. DIETZ: Yes, but if you start at the beginning it appears to me that, as I would assume Mr. Wilhoit would pick the book up to read, to start with the introduction, that is where the most redeeming value appears. So, with that in mind, I would ask your Honor to give him one chance.

* * * * *

[73] THE COURT: Mr. Wilhoit, I suppose it might safely be said that the vast majority of problems which a city faces are brought about by neglect, decay, pollution, and a withering away of any moral fiber in the population which is necessary to provide the basis for a rebirth.

Our utmost fear is being polluted, and we're passing laws and making efforts to correct it.

I look out of the window of this courtroom, and I see the building of a Metro, which will hopefully revitalize the city.

I drive up what were business corridors, and what a few short weeks less than thre years ago were destroyed in a paroxysm of grief and hatred, and after some three years the decay has set in.

I sit here as a judge daily and watch a parade of young people come through polluted and destroyed by the evils of drugs.

In my view, sir, you are a polluter of the morality and the decency of the community. You make your living by the sale of such filth, whose only use, whose only result can be a further whittling away of the fabric of the morality of our society.

I read daily of complaints by businessmen who seek [74] somehow to rebuild destroyed areas of this city; to seek somehow to revitalize it economically, and who complain bitterly about the presence of these so-called adult book stores; who complain bitterly about the type of people that they gather around them; who complain bitterly indeed about the results of the pollution which you spread.

I find myself practically unable to attend a decent movie in the downtown area, without being subjected to pornography.

It has no useful value in a decent society, and in my view, sir, you differ from the likes of David Harris, and the likes of Martin King in that for you morality, principle, decency, apparently play no part, concern for the community plays no part, but the concern for the dollar does.

You have skirted on the edges of the law. You have deliberately and openly defied the law for reasons known only to yourself.

When a judge imposes sentence, he has a variety of reasons for doing it. In the case of the young drug addict who finds himself trapped by the horrors of heroin, the Court seeks to rehabilitate him, seeks to give him another chance,

seeks somehow to revive him in a society which has denied him a proper education, has denied him a chance, has denied him a fit place to live, has denied him the opportunity of a job, and has exposed him to the type of filth and drippings which you [75] sell.

The Court has also a function, I suppose, of punishing the wrongdoer, and in determining whether to punish a wrongdoer the Court must be mindful of whether or not the wrongdoer's actions were deliberate and calculated and knowing, and finally, but not least of all, and particularly in the type of case that confronts me today, the Court has a function of imposing a sentence which will serve as a stern warning to others similarly tempted, that this community, this society, and this Court will not tolerate, so far as it is possible for me to do anything about it, the continued pollution of the morality and the decency of this community, and I need not remind you that a sentence which serves as an object lesson to others, and a warning to those similarly tempted is useless unless it is made known to those similarly tempted.

The Court sentences you to one year in prison and a $3,000 fine, and I order him detained.

LIBRARY
SUPREME COURT, U. S.

No. 71-[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1971

FREDERIC C. WILCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-523

FREDERIC C. WILHOIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the Superior Court for the District of Columbia, petitioner, then the proprietor of a large bookstore specializing in erotic publications, was found guilty of selling an obscene book ("The Teeny Suckers") to an undercover police officer, in violation of 22 D.C. Code (Supp. III, 1970) 2001(a)(1)(A). He was sentenced to one year in prison and a $3,000 fine. The District of Columbia Court of Appeals affirmed (Pet. 3a-8a).

Petitioner contends that the First Amendment protects the purveying of obscene material if sold to adults without pandering. He also contends that the courts below erred in finding the book to be obscene based upon an examination of the book itself without the introduction of other evidence.

This Court has held that the distribution of obscene material for commercial purposes to adults is not protected by the First Amendment. *United States* v. *Reidel*, 402 U.S. 351. Similarly the courts of appeals have uniformly held that, with respect to hard core obscenity such as the trial judge found was involved here, the government need not introduce any extrinsic evidence on the issue of national community standards or appeal to prurient interests, but may rely on the obscene material itself. See, *e.g.*, in addition to the cases cited at Pet. 6a, *United States* v. *Wild*, 422 F.2d 34 (C.A. 2), certiorari denied, 402 U.S. 986.

It is there fore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 448461 274